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# UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law  
of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

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VOLUME 58

APRIL

NUMBER 7

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## NOTES.

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### THE LIABILITY IN TORT OF A CHARITABLE HOSPITAL TO ITS PATIENTS.

Two recent cases, one in England<sup>1</sup> and the other in Pennsylvania,<sup>2</sup> raise again the interesting question of the liability of a charitable hospital to its patients for the negligence of its doctors and nurses. In the former the action was brought by a free patient for injuries received through the negligence of a surgeon or nurse during an operation. Recovery was denied on two grounds,—(1) that the surgeon and nurses (during an operation) were not the servants of the defendant, and (2) that the defendant's only undertaking was to use due care in the

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<sup>1</sup> *Hillyer v. Mayor, etc.*, 101 L. T. 368 (1909).

<sup>2</sup> *Gable v. Sisters of St. Francis* (not yet reported), Pa. Sup. Ct. E. D., Jan. T. 1909, 290, 291.

selection of its servants and to furnish proper appliances. In the latter a pay patient brought the action for an injury due to the negligence of a nurse and was denied recovery on the trust fund theory.

The subject of the financial liability of a charity in general has now reached a stage of development where it merits comprehensive treatment, but the scope of this note will be confined to the single point of the liability of a charitable hospital to the recipients of its bounty for injuries due to the negligence of its doctors or nurses.

How far public policy requires the exemption of charities from liability in tort and contract is a question on which there is wide divergence of opinion,<sup>3</sup> but the authorities are practically unanimous that a charitable hospital should not be liable to its patients for the negligence of its servants. Two cases, one in Rhode Island<sup>4</sup> and the other in New Brunswick,<sup>5</sup> break this line of authority, but it is interesting to note that the next year after the Rhode Island decision was rendered it was overthrown by statute.<sup>6</sup> Granting, then, that public policy does demand the exemption of a hospital from liability to its patients in such cases, upon what theory is this exemption to be obtained?

# *1. Where the Injury is Due to the Negligence of One not under the Control of the Hospital.*

No difficulty arises where the action is founded on the negligence of a surgeon or other person not under the control of the hospital, for the doctrine of *respondeat superior* applies only where the relation of master and servant is established, and this relation "exists only between persons of whom the one has the order and control of the work done by the other."<sup>7</sup> This was the ground of the decision of Farwell, L. J., in *Hillier v. Mayor, etc., of London*,<sup>8</sup> and is unassailable.

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<sup>3</sup> Cf. "Public Charities and the Rule of Respondeat Superior," John M. Gest, Esq., 28 Am. Law Reg. N. S. 669. "Liability of Charitable Associations, etc.," R. M. McMurtrie, Esq., 29 Am. Law Reg., N. S. 209. "Torts of Hospitals," E. B. Callender, Esq., 15 Am. Law Rev. 640. See also *Central Law Journal*, vol. 53, p. 62, 224 and vol. 56, p. 184.

<sup>4</sup> *Glavin v. Hospital*, 12 R. I. 411, (1879).

<sup>5</sup> *Donaldson v. Commissioners*, 30 N. B. 279 (1890).

<sup>6</sup> Laws R. I. (1880) Ch. 162 § 1.

<sup>7</sup> Pollock on Torts (Webb) 91.

<sup>8</sup> 101 L. T. 368 (1909).

2. *Where the Injury is Due to the Negligence of One under the Control of the Hospital.*

Where, however, the tort is that of a servant of the hospital, the exemption from liability is not so easy. To attain this goal four theories have been suggested.

a. *Respondeat Superior Based on Benefit.*

In some cases the exemption has been attained by holding that the doctrine of *respondeat superior* is based on benefit, and that, therefore, as charitable hospitals are not conducted for gain, they do not fall within the reason of the rule.<sup>9</sup>

The fundamental objection to this is that, according to what seems the better view, the doctrine of *respondeat superior* is *not* based on benefit. "The law is plain that whosoever undertakes the performance of, or is bound to perform, duties \* \* \* is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual that has undertaken to discharge them. If he elects to perform the duties by employing servants, if, in the nature of things, he is bound to perform the duties by employing servants, he is responsible for their action in the same way that he is responsible for his own."<sup>10</sup>

b. *The Trust Fund Theory.*

*Prima facie*, then, the doctrine of *respondeat superior* should apply to a hospital though not conducted for profit, and the trust fund theory has, therefore, been invoked to exempt such institutions from liability. This theory holds that "a public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise." It was upon this principle that the recent case of *Gable v. Sisters of St. Francis* (not yet reported) has just been decided by the Supreme Court of Pennsylvania. The opinion rests mainly on two decisions,—*Fire Insurance Patrol v. Boyd*,<sup>11</sup> and *Downes v. Hospital*<sup>12</sup>—the Court failing to note

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<sup>9</sup> *Hearns v. Hospital*, 66 Conn. 98 (1895); *Farrigan v. Pevear*, 193 Mass. 147 (1906).

<sup>10</sup> *Gilbert v. Trinity House*, L. R. 17 Q. B. D. 795 (1886).

<sup>11</sup> *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 647 (1888).

<sup>12</sup> 101 Mich. 555 (1894).

that the latter decision, in so far as it was based on any trust fund theory, has been overruled.<sup>13</sup>

That the trust fund theory is not sound would seem to follow from an examination of the law of trusts in general. If the doctrine of *respondeat superior* is not based on benefit, an individual trustee of an unincorporated charity would doubtless be held personally liable for the negligence of the servants in the administration of the charity, and, upon well-known principles of trusts, he could, if personally not at fault, recover over against the fund;<sup>14</sup> and in such case the injured party could, instead of enforcing his judgment against the trustee as an individual, have immediate recourse against the trust fund in the nature of an equitable execution.<sup>15</sup> The law of trusts would, therefore, seem to uphold the liability of the trust fund for the negligence of the hospital's servants. Upon this line of reasoning, apparently, the Massachusetts Supreme Court, which had previously been committed to the trust fund theory,<sup>16</sup> was, in a recent action against the trustee of an unincorporated hospital,<sup>17</sup> forced to hold that the doctrine of *respondeat superior* is based on benefit. The trust fund theory is not a development of the law of trusts, but had its origin in a dictum, since repudiated, in the case of *Duncan v. Findlater*.<sup>18</sup>

Again, the trust fund theory seems unsound in that it permits the mere intention of the donor (granting that such intention exists) to withdraw his gift to the charity from the rules of property, a restraint on alienation far greater than that allowed, even in Pennsylvania, in the case of spendthrift trusts.

If the theory were carried to its logical conclusion it should certainly apply to breaches of contract as well as to torts, and to the negligence of the corporation in the selection of its servants as well as to the negligence of servants. No jurisdiction has, however, carried the doctrine to this extent. In Tennessee it has been expressly repudiated in the case of breach of contract.<sup>19</sup> Some jurisdictions have expressly restricted it to cases where the negligence is that of a servant,<sup>20</sup> though in

<sup>13</sup> *Bruce v. Church*, 147 Mich. 230 (1907).

<sup>14</sup> *Bennett v. Wyndham*, 4 De. G. F. & J. 259 (1862).

<sup>15</sup> *In re Raybould*, (1900) 1 Ch. 199. In jurisdictions where such immediate recourse is not allowed the reason is purely procedural.

<sup>16</sup> *McDonald v. Hospital*, 120 Mass. 432 (1876).

<sup>17</sup> *Farrigan v. Pevear*, 193 Mass. 147 (1906).

<sup>18</sup> 6 Cl. & F. 894. (1839). This dictum was repudiated in *Mersey Docks Trustees v. Gibbs*, 1 E. & L. App. 93 (1866).

<sup>19</sup> *Hall-Moody Inst. v. Copass*, 108 Tenn. 582 (1902).

<sup>20</sup> *McDonald v. Hospital*, 120 Mass. 432 (1876).

others the language seems broad enough to cover all actions of tort.<sup>21</sup> In Pennsylvania the doctrine is not applied where the negligence is incident to a business collateral to the charitable object of the trust,<sup>22</sup> and the charity is liable for a municipal assessment for the cost of curbing, paving, etc., though such is held to be "a liability incurred for neglect of a duty imposed by the police power of the city."<sup>23</sup>

Finally, the trend of authority to-day is away from the trust fund theory as a ground of the exemption of charitable hospitals from liability for the negligence of their servants. In England, to be sure, the case of *Feoffees of Heriot's Hospital v. Ross*<sup>24</sup> has never been expressly overruled, but, as it was based on the *dictum* in *Duncan v. Findlater*,<sup>25</sup> overruled in *Mersey Docks Trustees v. Gibbs*,<sup>26</sup> and as no mention of it was made in the recent case of *Hillyer v. Mayor, etc.*,<sup>27</sup> it must be considered as no longer an authority, and it may be safely said that the trust fund theory on which it was based has been repudiated in England. The Federal<sup>28</sup> and New York<sup>29</sup> courts have refused to apply this doctrine. It has been criticised in New Hampshire,<sup>30</sup> is not followed in Connecticut,<sup>31</sup> has been repudiated in Michigan,<sup>32</sup> and has never been followed in Rhode Island<sup>33</sup> or New Brunswick,<sup>34</sup> and even the Massachusetts Supreme Court, which early adopted it, showed a tendency when the question was last brought before it<sup>35</sup> to find other grounds of exemption. On the other hand, an examination of the cases in the few jurisdictions which still adhere to the trust fund theory will show that most of them can be explained on more satisfactory grounds.

<sup>21</sup> *Parks v. N. W. University*, 218 Ill. 381 (1905); *Abston v. Waldon Academy*, 118 Tenn. 24 (1906); *Perry v. House of Refuge*, 63 Md. 20 (1884).

<sup>22</sup> *Winnemore v. Phila.*, 18 Pa. Super. 625 (1901).

<sup>23</sup> *Phila. v. Penna. Hospital*, 143 Pa. 367 (1891).

<sup>24</sup> 12 Cl. & F. 507 (1846).

<sup>25</sup> 6 Cl. & F. 894 (1839).

<sup>26</sup> 1 E. & I. App. 93 (1866).

<sup>27</sup> 101 L. T. 368 (1909).

<sup>28</sup> *Powers v. Hospital*, 109 Fed. 294 (1901).

<sup>29</sup> *Kellogg Church Foundation*, 112 N. Y. S. 566 (App. Div.) (1908).

<sup>30</sup> *Hewett v. Association*, 73 N. H. 556 (1906).

<sup>31</sup> *Hearns v. Hospital*, 66 Conn. 98 (1895).

<sup>32</sup> *Bruce v. Church*, 147 Mich. 230 (1907).

<sup>33</sup> *Glavin v. Hospital*, 12 R. I. 411 (1879).

<sup>34</sup> *Donaldson v. Commissioners*, 30 N. B. 279 (1890).

<sup>35</sup> *Farrigan v. Pevear*, 193 Mass. 147 (1906).

### *c. Assumption of Risk.*

During the last few years the non-liability of a charitable hospital to its patients has been explained upon the theory that the beneficiaries, including pay as well as free patients, assume the risk of any injury incurred through the negligence of the hospital's servants if due care has been used in their selection. This doctrine is followed in the Federal,<sup>36</sup> Michigan,<sup>37</sup> and New York<sup>38</sup> courts and has been at least suggested in England.<sup>39</sup> It seems in the main to be a satisfactory ground of decision.

### *d. Limited Undertaking.*

Another doctrine, which is at least plausible, was the basis of the opinion of Kennedy, L. J., in the recent case of *Hillyer v. Mayor, etc.*<sup>40</sup> Under it the exemption of a hospital from liability for the negligence of its servants is based on the theory that a hospital undertakes merely to use due care in the selection of its servants and to furnish proper appliances.

Under either of the last two theories the patient could, of course, recover if he could establish a contract which the hospital had broken.<sup>41</sup>

Institutions of public charity are daily becoming more numerous, and the problems connected with their liability are, therefore, of increasing importance. How far public policy will in the future demand their exemption from liability is of course problematical, but the development of the law indicates that the required exemption will at no distant date be placed upon firmer and more satisfactory foundations than any trust fund theory can supply.

H. E.

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## RIGHT OF SURETY TO EXONERATION.

The right of the surety to maintain a bill in equity against the principal debtor after the obligation becomes payable, and exonerate himself from further liability, has been recognized

<sup>36</sup> *Powers v. Hospital*, 109 Fed. 294 (1901).

<sup>37</sup> *Bruce v. Church*, 147 Mich. 230 (1907).

<sup>38</sup> *Kellogg Church Foundation*, 112 N. Y. S. 566 (App. Div.) (1908).

<sup>39</sup> *Tozeland v. Guardians*, L. R. (1907) 1 K. B. 920. See 47 Am. Law Reg. N. S. 124.

<sup>40</sup> 101 L. T. 368 (1909).

<sup>41</sup> *Ward v. Hospital*, 79 N. Y. S. 1004 (App. Div.) (1903).